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Supreme Court, U.S.
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No. 04-636

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

REPLY TO THE OPPOSITION STATEMENT OF FACTS 1

REASONS IN FURTHER SUPPORT OF GRANTING THE PETITION 2

I. This Court's Guidance Is Immediately Imperative And Necessary To Protect The Laws Guarding Good And Honorable Reputation From Intentional Defamatory Falsehoods And To Protect The Integrity Of The Freedom Of Press 2

II. New York's Common Law Requires The Second Circuit To Apply The "Intensity Of Suspicion" Test When Deciding Whether A Defamation To A Group Could Be "Of And Concerning" The Individual Members 5

III. Second Circuit's Failure To Apply The Controlling New York Common Law Raises A Serious And Compelling Issue Under The Due Process Clause Of The Constitution ... 7

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Anyanwu v. Columbia Broadcasting System, Inc., 887 F. Supp. 690 (S.D.N.Y. 1995) 3

Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 445 N.Y.S.2d 786 (2d Dept. 1981) 5, 7, 8

Brock v. Thompson, 948 P.2d 279 (Okla. 1997) ... 4

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 8

Butner v. United States, 440 U.S. 48 (1979) 8

Church of Scientology International v. Time Warner, Inc., 806 F. Supp. 1157 (S.D.N.Y. 1992) 3

Cort v. Ash, 422 U.S. 66 (1975) 8

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 8

Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592 (N.Y. 1936) 5

Huddleston v. Dwyer, 322 U.S. 232 (1944) 8

International Text-Book Co. v. Leader Printing Co (C.C.), 189 F. 86 6

Cited Authorities

	Page
Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8 (Ky. 1978)	4
Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186 (N.D. Cal. 1980)	3
Mecher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (N.Y. 1947)	7
Mikolinski v. Burt Reynolds Production Co., 409 N.E.2d 1324 (Mass. App. Ct. 1980)	3
National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374 (S.D.N.Y. 1980)	4
Paul v. Davis, 424 U.S. 693 (1976)	8, 9
Provisional Government of Republic of New Afrika v. American Broadcasting Cos., 609 F. Supp. 104 (D.D.C. 1985)	3
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	8
Ryckman v. Delavan, 25 Wend. 186	6
Silsdorf v. Levine et al., 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822 (N.Y. 1983)	7

Cited Authorities

Page

Six Companies of California et al. v. Joint Highway Dist. No. 13 of State of California, 311 U.S. 180 (1940), *reh'g denied*, 311 U.S. 730 (Jan. 6. 1941) 7

Van Ingen v. Mail and Express Pub. Co., 156 N.Y. 376, 50 N.E. 979 (N.Y. 1898) 6

West et al. v. American Telephone & Telegraph Co., 311 U.S. 223 (1940) 7

Weston v. Commercial Advertiser Ass'n, 184 N.Y. 479, 77 N.E. 660 6

Other Authorities:

Webster's II Dictionary 6

REPLY TO THE OPPOSITION
STATEMENT OF FACTS

Respondent Sing Tao Newspapers New York, Ltd. ("STN") published a full-page article in color on September 20, 2001 labeled "Special Edition" that included defamatory false statements against Falun Gong. C.A. App. A-366.[1] A letter from an attorney on behalf of the practitioners of Falun Gong in the New York area was sent to STN on October 24, 2001, notifying STN that the malicious false statements in the article "could be grounds for and bring about various claims in defamation." C.A. App. A-494. The letter further stated that

> [b]y way of Sing Tao's publication of irresponsible articles, such as the one in question, with its intent of misleading the public, reasonable persons could surmise that the negative propaganda (and perhaps also persecution) against Falun Gong in China, which are condemned by international community and law, are now attempting to find their imported acceptance into the United States contrary to the law and values of the[] United States.

C.A. App. A-496.

STN never contacted such attorney nor attempted to respond to her letter. Consequently, there was never a settlement. Three Falun Gong practitioners by the names of Kangang Xu, Wei Lu, and Yun Song wrote a letter jointly, dated October 25, 2001, to Respondent David Mui, requesting him to make an effort to reduce the harm caused by the September 20, 2001 article to the New York communities and the New York practitioners of

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1. "C.A. App. A- _____" refers to the page in the Appendix filed with the Second Circuit Court of Appeals. "Pet. p. ____" or "Pet. pp. ____" refers to the page(s) in the Petition for a Writ of Certiorari filed with this Court on November 8, 2004. "Pet. Fn. ____" refers to the footnote in such Petition.

Falun Gong. C.A. App. A-497. Kangang Xu and Wei Lu have subsequently joined as Plaintiffs in the case. Although STN later published an article provided by Falun Gong, STN unilaterally inserted an editorial comment into the article, attributing responsibility of all Falun Gong statements in the September 20, 2001 article to its headquarters in Hong Kong and Communist China. Following STN's publication of the article on October 25, 2001, STN published further defamatory false articles, including one on April 5, 2002, damaging the reputation of the petitioners by, *inter alia*, repeating fabricated and staged news concerning a self-immolation at Tiananmen. C.A. App. A-362.

REASONS IN FURTHER SUPPORT OF GRANTING THE PETITION

I. This Court's Guidance Is Immediately Imperative And Necessary To Protect The Laws Guarding Good And Honorable Reputation From Intentional Defamatory Falsehoods And To Protect The Integrity Of The Freedom Of Press

The respondents' failure to follow the most fundamental journalistic ethics raises serious questions as to the real role of their newspapers. Not in operation to serve the general welfare of the readers—evidenced by the continuous publication of defamatory and fabricated materials—the respondents' newspapers depart fundamentally from the media operative in the cases cited by the respondents, and, thus, necessitate that the respondents not be afforded the same rights and protections as those of the traditional media defendants.[2]

2. The fact that a Communist Chinese regime involved in the torturing and killing of practitioners who practice Falun Gong is spreading intentionally false materials in the United States might be in violation of the Foreign Agents Registration Act of 1938 (Act). The Act requires registration, reporting, and disclosure by persons engaging in the propaganda on behalf of foreign powers.

The majority of the cases cited by the defendants to support the use of the size of the group as a determinant factor for recovery involves media that are fundamentally different from the ones in this case. None of the cases cited by the respondents in their opposition briefs involve a media controlled by a foreign dictatorship, not to mention a media with ties to a regime documented to be torturing and murdering a group of people for not giving up their belief in seeking self-improvement. For instance, in *Anyanwu v. Columbia Broadcasting System, Inc.*, 887 F. Supp. 690 (S.D.N.Y. 1995), defendant CBS is an independent information broadcaster headquartered in the United States and devotes itself to producing and broadcasting reputable programs, such as "60 Minutes," a weekly news and public affairs magazine show. CBS is not controlled by any government or regime. In *Church of Scientology International v. Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992), defendant Time Warner is a private independent media and entertainment company headquartered in the United States. Its diverse programs have received numerous critical media and documentary awards globally. It also has no known government ties. Similarly, in *Provisional Government of Republic of New Afrika v. American Broadcasting Cos.*, 609 F. Supp. 104 (D.D.C. 1985). ABC is an independent radio and television network headquartered in the United States and is also not controlled by any government. In *Mikolinski v. Burt Reynolds Production Co.*, 409 N.E.2d 1324 (Mass. App. Ct. 1980), the defendant media company is a private and independent film producing company established in the United States. Likewise, it is a private company and is not controlled by any government. This is also the case with *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980), where none of

the media defendants, including Public Broadcasting System, are controlled by any government.[3]

The circumstances surrounding the parade of malicious false publications over the years—including, but not limited to, a regime's ongoing effort to eliminate a group by torture and killing its members (C.A. App. A-54, 143), the direct control of the respondents by the same regime seeking to completely eliminate the practitioners (C.A. App. A-402-405, 409), the compulsive repetition of the falsifications and the sheer volume of the false articles (C.A. App. A-160-162), the collaboration among the respondent newspapers (C.A. App. A-402-405, 409), the articles directed at practitioners in the New York area (Pet. pp. 5-7, C.A. App. A-160-162)—causing serious injuries to the Petitioners (Pet. Fn. 6), establish reasons to believe that the publications are targeted at the petitioners and are referring to them. Indeed, this case is unprecedented in the history of the United States and engages an issue of a historical and Constitutional magnitude. The correct guidance by this Court is, therefore, necessary to position the laws in this area for future course in the United States and the world's history.

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3. *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374 (S.D.N.Y. 1980) is a non-media defendant case decided before the establishment of the "intensity of suspicion" test in New York. *Brock v. Thompson*, 948 P.2d 279 (Okla. 1997) is an *Oklahoma* case involving *general* statement about plaintiffs' lawyers, which decision cannot serve as a source of applicable law to this case. *Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders*, 563 S.W.2d 8 (Ky. 1978) is a *Kentucky* case involving only *critical opinion*.

II. New York's Common Law Requires The Second Circuit To Apply The "Intensity Of Suspicion" Test When Deciding Whether A Defamation To A Group Could Be "Of And Concerning" The Individual Members

An absolute bar against finding liability for defaming members of a group is overbroad and is not and has never been the law of New York. New York only requires the defamatory matter to be referring to the plaintiffs. *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592 (N.Y. 1936).

The rightful application of the New York common law requires the lower court to apply the "intensity of suspicion" test established in *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (2d Dept. 1981) with prudence, including examining judiciously the surrounding circumstances of the publication of the defamatory articles.

Size per se was never the focus in New York group defamation cases. "In New York there has been no articulated limit on size." *Id.* at 792. "An absolute limit on size is not justifiable. There is no compelling logic 'in allowing a greater number of wrongs to afford a lesser degree of liability' in group defamation actions." *Id.* This is especially so when the "increased size is not sufficient to dilute the harm caused to the individuals from the statement so that the resulting injury falls below the threshold of legal recognition." *Id.* at 794.

Respondents attempt to escape all culpabilities for intentionally publishing falsified information against the petitioners by attempting to have this Court focus on the headcount of Falun Gong practitioners worldwide. The use of an arbitrary numerical approach to determine whether a media defendant is liable for publishing malicious false statements is certain to lead to injustice. This unacceptable

consequence is precisely what the law of New York seeks to avoid through the "intensity of suspicion" test.

Furthermore, not being named specifically in the defamatory articles does not equate the articles as not referring to or not applicable to the petitioners. It has long been established that the defamatory articles do not need to specifically name the persons for the defamation to be referring to the persons. *Van Ingen v. Mail and Express Pub. Co.*, 156 N.Y. 376, 386, 50 N.E. 979, 981 (N.Y. 1898) (it is settle law that "where a libel does not name the plaintiff, he may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies"); *Ryckman v. Delavan*, 25 Wend. 186, 202 ("if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff"), citing *Weston v. Commercial Advertiser Ass'n*, 184 N.Y. 479, 77 N.E. 660; *International Text-Book Co. v. Leader Printing Co. (C.C.)* 189 F. 86.[4]

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4. Respondent China Press mentions that the use of the terms "evil cult" to describe Falun Gong practitioners in its numerous articles is only an opinion or "subjective expression" that is protected under the Constitution. This is misleading because the word "evil" means "morally wrong or bad" and "causing injury, ruin or pain." *Webster's II Dictionary*. "Cult" has the meaning of "a religion or religious sect generally regarded as bogus or extremist." The usage of the words "evil" and "cult" together, in and together with intentionally fact-laden articles attributing Falun Gong practitioners in the New York area to be murderers, terrorists and ones performing other crimes, denotes the most malicious attempt at injuring the reputation of the petitioners. On this account, the word "sect" itself

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III. Second Circuit's Failure To Apply The Controlling New York Common Law Raises A Serious And Compelling Issue Under The Due Process Clause Of The Constitution

The "intensity of suspicion test" established by the New York intermediate court is controlling in this case, unless it is clear that the highest state court would rule otherwise. *Six Companies of California et al. v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180 (1940), *reh'g denied*, 311 U.S. 730 (Jan. 6. 1941). *See also West et al. v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). This test requires the federal court facing such issue to look beyond the size of the group being defamed to decide whether the defamatory false statements are "of and concerning" the injured individuals.

Although the controlling "intensity of suspicion" test established in the *Brady* case was brought to the attention of the Second Circuit in the briefs and at the oral argument, the Second Circuit has completely failed to acknowledge the

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is also often associated with the word "cult" and leads many to express hatred, contempt and aversion against the petitioners. A writing is defamatory or "actionable without allegation of proof of special damage if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community," and it depends, "among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation to another time or in a different place." *Mecher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (N.Y. 1947). *See also Silsdorf v. Levine et al.*, 59 N.Y.2d 8, 12, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825 (N.Y. 1983) ("the entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader").

"intensity of suspicion" test in its decision, not to mention applying the test. In its summary order, the Second Circuit merely inserted a citation to the *Brady* case, but briefly mentioning a case name in a summary order is far from applying the controlling New York test. As of today, the "intensity of suspicion" test established in the *Brady* case remains to be the controlling law in New York on the determination of the "of and concerning" issue in the context of group defamation. Second Circuit's failure to apply the controlling state law has violated the due process protection afforded the petitioners under the United States Constitution.

The cases cited by the respondents do not support a proposition otherwise. Indeed, they further strengthen the reasoning that the Second Circuit is required to apply the controlling state law and test established by the *Brady* court. *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) ("where state law controls, federal appellate courts as well as trial courts must ascertain and apply the state law"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (involving interpretation of state statute); *Butner v. United States*, 440 U.S. 48 (1979) (state law applies in security interest question); *Cort v. Ash*, 422 U.S. 66, 76 (1975) (the duty is to decide the case "according to the law existing at the time of the decision"); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949), ("rights enjoyed under local law should not vary because enforcement of those rights was sought in federal court rather than in the state court"), *reh'g denied*, 338 U.S. 839. *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (in diversity cases, the rights enjoyed under state law should not be different only because the enforcement of those rights was sought in a federal court instead of the state court).

Respondents' citing of the case, *Paul v. Davis*, 424 U.S. 693 (1976), to support their contention that "there is no

constitutional basis for providing a libel claim" is entirely out of context. *Paul v. Davis* is *not* a defamation claim, but a claim based on the deprivation of "liberty" or "property" rights under the Constitution. The Court in that case acknowledged that if the same underlying claim was brought in a state court, it would have been an actionable defamation claim. *Id.* at 697. This is very different with what is at issue in our case. What we have here is Second Circuits' non-application of the controlling state law, from which lies the petitioners' claim for Second Circuit's violation of the Due Process Clause.

Respondent newspapers cannot deny that they are directly responsible for the hostile climate created in the New York area against the Petitioners, an effect clearly intended by the respondents; a few headlines they have been using are illustrative of such heinous intentions. Petition pp. 5-7. Worse yet, the harm done are beyond the damages suffered by the petitioners, for what has been created is an atmosphere where intentional falsities are allowed to spread continuously and thrive.[5] The consequences of these defamatory articles are far-reaching. Many of these reports written in New York are imported back into Communist China to legitimize and increase the torture and killing of Falun Gong practitioners there. The lives and well-being claimed by such publications will not fade into insignificance. By claiming protection from

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5. For more than five years, the petitioners have been enduring the severe pressure in the hostile communities they work and live in. Petitioners continuously resist through all peaceful means, urging the international communities to help stop the torture and killing of practitioners still continuing in Communist China. However, each member of the larger community also needs to be held responsible to varying degrees for the creation of such environment, without their silence which poisonous spread would not have been possible.

the Constitution and laws of the United States but not heeding to the basic journalism ethical standards applicable to all responsible press here, the respondents are attempting to make a mockery of the legal system in the United States.

CONCLUSION

For all the foregoing reasons and the reasons stated in the Petition for a Writ of Certiorari filed earlier with this Court, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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